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88-6351

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

MAURICE M.,

Petitioner

v.

JACQUELINE BOUKNIGHT,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

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QUESTIONS PRESENTED

1. Does a court order directing a parent to produce her infant son compel incriminating testimony in violation of the parent's Fifth Amendment privilege against self-incrimination?

2. Even if the Fifth Amendment privilege is implicated by a court order to produce a child, is the privilege overcome by the important societal interest in protecting children in jeopardy of serious injury, particularly where a parent's risk of self-incrimination is "speculative and conjectural"?

LIST OF PARTIES

The parties to the proceedings below included petitioner Maurice M., his mother, respondent Jacqueline Bouknight, and the Baltimore City Department of Social Services (hereinafter "BCDSS"). BCDSS was aligned with petitioner as appellees in the Court of Appeals of Maryland and on January 18, 1989 filed in this Court a separate Petition for a Writ of Certiorari to the Court of Appeals of Maryland, Petition No. 88-1182.

Maurice M. has had his last name redacted in all appellate proceedings below to preserve his confidentiality as required by Md. Rule 8-121 (1988 Supp.).

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OPINIONS BELOW

The opinion of the Court of Appeals of Maryland is copied in Appendix A, at pp. 1a-23a. The dissenting opinions of Judges McAuliffe and Rodowsky are also contained in Appendix A, at pp. 24a-42a. Appendix B contains the order of the Court of Appeals, at p. 43a. Its order denying a timely Motion for Rehearing is reproduced in Appendix C, at p. 45a. The opinion of the Court of Appeals of Maryland will be reported at 314 Md. 391, 550 A.2d 1136 (1988). The Order and Opinion of Chief Justice Rehnquist staying the order and judgment of the Court of Appeals of Maryland is contained in Appendix D, at p. 46a.

The orders of the Circuit Court for Baltimore City, Division for Juvenile Causes (Mitchell, J.), are unreported and contained in Appendix E, at p. 51a.

JURISDICTION

The decision of the Court of Appeals of Maryland (hereinafter "Maryland court") was entered on December 19, 1988. On the same date, the Court of Appeals denied a timely Motion for Rehearing. Chief Justice William H. Rehnquist, sitting as Circuit Justice for the Fourth Circuit, temporarily stayed the Maryland court's judgment on December 19, 1988. After receiving responses from all parties to the application for a stay, Chief Justice Rehnquist extended the stay on December 21, pending the filing of a petition for a writ of certiorari on or before January 23, 1989 and full consideration by this Court. This petition is filed within 90 days of the Maryland court's judgment. See 28 U.S.C. §2101(c). This Court has jurisdiction pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS

The "self-incrimination clause" of the Fifth Amendment to the Constitution of the United States provides as follows: "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." The following sections of the Maryland Code and Rules are involved in this case and are set forth in Appendix F at p. 56a: Md. Cts. & Jud. Proc. Code Ann. (1984 Repl. Vol.) (hereinafter "CJP") §3-801(e); §3-802(a); §3-814(c); §3-815(b)(1); §12-303(3)(x) (1988 Supp.); §12-701(b); and Md. Rules 906(a), 911(a), and 8-121 (1988 Supp.).

STATEMENT OF THE CASE

Petitioner Maurice M. is a two year old boy last seen by public officials in September 1987. He was born on October 3, 1986 to respondent Jacqueline Bouknight, then a 20 year old woman who had grown up in Baltimore's foster care system with a long history of emotional problems. (Appendix A, at p. 3a).

Within his first two months of birth, Maurice suffered serious fractures of his arm, shoulder blade, and shoulder socket. (Appendix A, at p. 25a). Less than two months later, the infant was again hospitalized, his left thigh fractured and his right upper arm immobile. Id. The early onset of these injuries, coupled with their multiplicity and extremely unusual locations, raised "very high" suspicions of child abuse.[1/] During Maurice's second hospitalization in early 1987, his mother was observed throwing him into a crib on one occasion and shaking him profusely on another. He wore a spica (full-body) cast during both incidents. (Appendix A, pp. 3a, 25a).

1/ In November 1986, the baby was brought to Johns Hopkins Hospital for pneumonia but was found to have separate fractures of his right femur (upper arm), scapula (shoulder blade) and glenoid (shoulder socket). Although the injuries could have occurred during child birth one month earlier, no trauma was noted during delivery. On January 23, 1987, Francis Scott Key Hospital detected a fractured left femur (thigh), general upper extremity weakness, and an immobilized right upper arm suggesting a spinal cord injury, nerve damage in the shoulder joint, or birth palsy. An orthopedic specialist concluded that the rare concurrence of multiple bone fractures of different limbs and flat bone skeleton (shoulder) in a three month old infant made the likelihood of child abuse "very high" and raised concerns of "serious or fatal injuries" absent corrective treatment. (Appendix G, at pp. 59a-64a).

On February 11, 1987, the Baltimore City Department of Social Services (hereinafter "BCDSS" or "Department") obtained an emergency grant of custody from the Circuit Court for Baltimore City, Division for Juvenile Causes (Mitchell, J.) (hereinafter "juvenile court") and placed the infant in shelter care, an emergency foster care status.[2/] At the same time, BCDSS filed a petition in juvenile court alleging that Maurice was a Child in Need of Assistance (hereinafter "CINA") requiring the juvenile court's protection,[3/] due to the allegations of abuse. Both Maurice and Ms. Bouknight were represented by separate court-appointed counsel for the shelter care hearing and all subsequent proceedings.[4/] The allegations were sustained by a stipulation of facts entered by all parties at a hearing held on May 19, 1987, and shelter care was continued by court order. (Appendix A, at pp. 3a, 25a).

Maurice was returned to his mother's home on July 17, 1987 by the juvenile court under a modified shelter care order following a contested hearing. On August 18, 1987, the parties entered a "carefully structured agreement"

2/ The juvenile court is authorized to grant shelter care whenever necessary to protect the child. §3-815(b)(1).

3/ CJP §3-801(e) defines a Child in Need of Assistance in part as one who does not receive ordinary and proper care and attention and whose parents, guardians or custodians are unable or unwilling to give proper care and attention to him and his problems.

4/ All CINA's in Maryland are entitled to be represented by their own counsel. Md. Rule 906(a). The state Department of Human Resources contracts with the Legal Aid Bureau, Inc. to represent children in most of the CINA cases in Maryland. More than 3,000 children were represented by the Legal Aid Bureau in 1988 at hearings on new CINA petitions.

approved by the court in a dispositional order which placed Maurice in his mother's legal custody and required BCDSS to provide protective supervision and submit reports to the court every six months. In turn, the mother was ordered to (1) cooperate with the Department; (2) continue to attend her therapy sessions until discharged; (3) attend parenting sessions at a specialized clinic; (4) continue to work with a parent aide assigned by BCDSS to assist with parenting skills; and (5) refrain from physically punishing Maurice. (Appendix A, at pp. 3a, 26a; Appendix E, at pp. 51a-52a).

No BCDSS employee has seen Maurice since September 8, 1987. (Appendix A, at p. 4a, n.2).[5/] On April 8, 1988,[6/] BCDSS petitioned the juvenile court to review the case, claiming, in part, that the mother had frustrated its efforts to monitor the home, had refused to reveal the child's whereabouts, had not utilized therapeutic intervention as ordered, and had been evaluated by a psychologist in July 1987 to be a serious risk to the infant's safety.[7/]

5/ The Maryland court's decision cites September 4, 1987 as the last BCDSS observation of Maurice, but agency records introduced into evidence in May 1988 revealed that the parent aide did see the infant on September 8. Seven attempts were made to monitor the home from September 15, 1987 through March 22, 1988 -- two by the caseworker and five by the aide -- but the mother did not produce Maurice at any of these visits. After BCDSS learned on March 22 that the baby's father had been shot and killed and that the news so devastated the mother that she "wandered about in a daze," workers checked the baby's status and discovered that no therapy or medical appointments had ever been made. (Appendix G, at pp. 69a-71a).

6/ The Maryland court erroneously cites April 18 as the date of filing. (Appendix A, at pp. 3a, 26a).

7/ The evaluation was conducted on July 27, 1987 by a psychologist approved by the mother's counsel but was not obtained by BCDSS until September 8, 1987 nor

(f.n. cont'd.)

When the mother continued to refuse to produce the child or identify his whereabouts, BCDSS filed a petition for contempt on April 19 and asked for an order pursuant to CJP §3-814(c) that the child be produced. (Appendix A, at pp. 3a-4a, 26a).

The mother avoided the hearing scheduled for April 20 despite having been served personally with a summons. A juvenile court master awarded temporary custody of the infant to BCDSS in a new shelter care order. Later that day, the court (Angeletti, J.) issued both an order to the mother to show cause why she should not be held in contempt for failing to produce the baby in court as well as a warrant for her arrest. (Appendix A, at p. 27a).

On April 27, 1988, the mother was finally located, arrested, and brought to the juvenile court. After a brief hearing, the court continued the mother's detention overnight to allow the police to verify her unsworn assertion

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(f.n. 7 cont'd.)

provided to counsel or the court until April 19, 1988. The report strongly advised against reunification, and among its most chilling findings for the potential of abuse was the following section:

> She is not now able to relate constructively to her child, since her child is seen as fulfilling her needs rather than the reverse. She becomes totally frustrated and enraged to find herself unable to gain from her child what she wishes as a replacement for what she lack[ed] in her own childhood. When her frustration mounts, she is likely to act out toward the child and sees the child as abusive to her rather than herself as abusive to the child.

(Appendix G, at p. 67a).

that Maurice had been placed with her sister in Dallas, Texas. When BCDSS reported on April 28 that the Dallas police had confirmed that Maurice was not with his aunt, the juvenile court (Mitchell, J.) found the mother in contempt of its directive to produce the child but explained that the contempt citation could be purged by producing Maurice to the court or revealing his whereabouts. (Appendix E, at pp. 54a-55a). While the Fifth Amendment privilege was not specifically asserted at this hearing, the mother's counsel did claim that the opportunity to purge "might not be constitutional" if it required admission to a crime. The court disagreed and noted that it required only the production of Maurice to satisfy the order. (Appendix A, at p. 5a).[8/]

At two subsequent hearings, on May 18 and 26, the mother's counsel did cite the Fifth Amendment as justification for her refusal to produce the child. Following the submission of legal memoranda by all parties,[9/] the juvenile court (Mitchell, J.) reaffirmed the contempt citation and specifically held that since the mother had available several non-communicative methods of producing Maurice without compromising her intent to remain silent, the

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8/ Impossibility has not been raised by the mother as a defense to the contempt citation. As Justice Rehnquist noted, "[t]here is no indication that she is unable to comply. . . ." Baltimore City Department of Social Services v. Bouknight, No. A-494 (Rehnquist, C.J., Circuit Justice), (Appendix D, at p. 46a).

9/ Counsel for Maurice and for BCDSS both argued that compelling production of the child was permissible since the Fifth Amendment did not apply to physical evidence that was not testimonial in nature. BCDSS claimed that

(f.n. cont'd.)

court's order did not compel testimonial communication in violation of the Fifth Amendment. On May 26, the mother appealed the contempt citation. (Appendix A, at p. 6a).

The Maryland court granted a writ of certiorari prior to consideration by an intermediate appellate court and expedited the schedule for briefs and oral argument. On December 19, 1988, by a 5-2 vote, the Maryland court (Murphy, C.J.) vacated the juvenile court's contempt citation and ordered Ms. Bouknight's immediate release from incarceration. The decision rested on an analysis of the "testimonial" prong of the three part test for asserting the Fifth Amendment privilege and relied specifically on the mother's incarceration as creating the need for "testimony":

> To purge the contempt order and thereby free herself from imprisonment, Bouknight must impart information to someone sufficient to permit Maurice to be produced in court, or provide information of his present whereabouts. Should she do so, Bouknight will necess-

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(f.n. 9 cont'd.)

the mother had waived her Fifth Amendment rights when she asserted the child's whereabouts to the court. Maurice's counsel also argued that the Fifth Amendment permitted the court to balance the interest of children in receiving protection from abuse or neglect against the risk to their parents of possible self-incrimination. The Maryland court's assertion that the "balancing" issue had not been raised or considered at the trial (Appendix A, at p. 19a, n. 4) is thus incorrect. Finally, Maurice's counsel also contended that the mother could not collaterally attack a valid court order to produce the child through a contempt proceeding. The mother's principal contention, that the court had no power to compel her to produce incriminating evidence against herself, was rejected by the court, which adopted the arguments of Maurice's and BCDSS' counsel.

> arily admit a measure of continuing control and dominion over Maurice's person.

(Appendix A, at p. 16a). The majority also dismissed arguments by counsel for Maurice and for BCDSS that the court must balance the possible threat of self-incrimination against the clear risks to Maurice and other children requiring judicial protection. After acknowledging this Court's standard for determining when and how society's interests may be weighed against Fifth Amendment values, the court nonetheless declined to apply a balancing test:

> While it may be argued that the Juvenile Causes Act absolutely requires that Bouknight produce Maurice in court or provide information as to his location, and thus bears some kinship to a statutory reporting requirement, we simply are unable in the [sic] circumstances to, in effect, totally expunge Bouknight's Fifth Amendment rights where the risk of prosecution is so substantial. Assuming, arguendo, that there may be causes in which a balancing test is appropriate to determine the existence of the Fifth Amendment privilege, we conclude that the case before us is not one of them.

(Appendix A, at pp. 22a-23a).[10/]

Judge McAuliffe dissented in an opinion joined by Judge Rodowsky on all points asserted in this petition. After focusing on the need to "consider the significant societal

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10/ The Maryland court held that the mother did not waive her Fifth Amendment privilege when she told the juvenile court on April 27 and 28 that Maurice was in Dallas with his aunt since the statements were unsworn and, in the court's view, both non-incriminatory and not based on a knowing and intelligent waiver of her privilege. (Appendix A, at p. 17a). A further argument by Maurice's counsel that his mother was collaterally barred from challenging the constitutionality of the contempt citation was not addressed by the Maryland court.

interest in the welfare of the child," (Appendix B, at p. 25a), the dissent then balanced the competing interests in favor of the child:

> Applying the teaching of Albertson [v. SACB, 382 U.S. 70 (1965)] and its progeny to the facts of this case persuades me that the statutory requirement of production, rooted as it is in the strongest possible public policy in favor of protecting children, clearly outweighs the limited cost of denying the application of the privilege to the testimonial assertions flowing from the act of production in this case.

(Appendix A, at p. 37a). Judge McAuliffe also found that the testimonial implications from the mother's production of the child were "limited", with questionable incriminating effect, but he chose not to apply this reasoning as an independent ground for his dissent. (Appendix A, at p. 33a).

REASONS FOR GRANTING THE WRIT

The decision of the Maryland court abruptly departs from long-settled views of this Court in several fundamental respects. First, the opinion clashes with this Court's consistent view that the right of children to receive protection from the state must supersede the interests of their parents whenever serious threats to their welfare exist. Second, the holding that production of Maurice would constitute incriminating testimony is wholly inconsistent with this Court's controlling decisions as to when acts of production create testimonial inferences. Third, the decision differs with this Court's standards for determining whether testimony is compelled and incriminating under the

Fifth Amendment. Finally, the Maryland court's refusal to weigh the societal interest in protecting helpless children against the cost of self-incrimination disregards this Court's pronouncements on when and how to balance competing Fifth Amendment interests.

The Maryland court's decision presents a stark challenge to parens patriae assumptions long held by society and is therefore an important one which, if not corrected, could paralyze juvenile and family courts across the nation. This Court therefore can and should review the case. See Supreme Court Rule 17.1(c).

A. The Decision Below Is In Conflict With This Court's Decisions That Protecting Children Is A Paramount Obligation Of The State.

The decision of the Maryland court focuses exclusively on the mother's privilege against self-incrimination, ignoring Maurice's desperate need for protection. In its equation of values, the parens patriae role of the juvenile court is subordinate to parental rights, an unprecedented challenge to this Court's longstanding rule that a child's welfare must be safeguarded against all risks of harm.

Prince v. Commonwealth of Massachusetts, 321 U.S. 158 (1944) firmly established parens patriae as a vital state responsibility superseding even the constitutional rights of parents. Despite the parents' valid First Amendment claim, the Court held that Massachusetts' parens patriae authority allowed it to convict parents who had directed their young children to peddle religious material on the streets of

Boston: "It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens." Id. at 165. This Court has repeatedly reaffirmed the primacy of parens patriae: "The State, of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years." Palmore v. Sidoti, 466 U.S. 429, 433 (1984). See also Lassiter v. Department of Social Services, 452 U.S. 18, 27 (1981) (child welfare is an urgent interest of the state).

The Maryland court's decision will wreak havoc on juvenile and family courts of this country. If the Fifth Amendment excuses Maurice's mother from producing him to the juvenile court, it also shields most parents from direct judicial process. For example, when the state suspects that children have been abused or neglected, it may no longer be able to offer protection by removing them from their homes if examination or treatment of the youngsters could result in discovery of incriminating information. And, most troubling of all, a parent suspected of abuse or neglect who regains custody of his/her child under an order of protective supervision would have the legal carte blanche to conceal all negative information about the child's status. The decision has devastating implications for parental kidnapping cases and for all courts whose effectiveness depends on the power to compel the production of children. In short order, each state's child welfare system would be frozen in

a constitutional gridlock abandoning young children like Maurice to otherwise preventable abuse and neglect.[11/]

B. The Decision Below Is In Conflict With This Court's Decisions That the Fifth Amendment Privilege Extends Only To Testimonial Communications.

The Maryland court's opinion concludes that because the mother's production of Maurice would imply some dominion or control over his status, his appearance in court would have testimonial aspects embraced by the Fifth Amendment. This analysis simply negates consistent decisions by this Court delineating the circumstances when testimonial communications can be inferred from acts of production.

In Schmerber v. California, 384 U.S. 757, 762-63 (1966), this Court emphasized that the state can coerce an unwilling party to produce evidence against him or herself unless the evidence involves testimony or communications:

> The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling "communications"

11/ The probable crisis in the child protection system comes at a time when that system is already overwhelmed by sharp increases in the confirmed incidence of child maltreatment nationwide. Child abuse reports rose 200% between 1976 and 1986. Of the more than 2 million child maltreatment reports received in 1986, an estimated 784,000 children (40%) were confirmed to be abused or neglected and approximately 80,000 court actions were initiated. See American Association for Child Protection, Division of American Humane Association, Highlights of Official Child Abuse & Neglect Reporting for 1986, Table 10.1, Table 7, and p. 11 (1988). In Maryland, child maltreatment reports rose 65% from 1981 to 1985, yet, national child protection resources have increased by only 2% during this same period. H.R. Rep. No. 260, 100th Cong., 1st Sess., Table 1, Findings p. XIII (Comm. print July 31, 1987).

> or "testimony" but that compulsion which makes a suspect or accused the source of "real" or "physical evidence" does not violate it.

Real or physical items which do not convey the thoughts or words of the individual are not protected by the Fifth Amendment from discovery. Hence, Maurice himself can be produced without implicating the Fifth Amendment so long as the act of his production does not itself assert testimonial information.

The restricted scope of the Fifth Amendment was further highlighted in Fisher v. United States, 425 U.S. 391 (1976). The Court declared that taxpayers could not invoke the privilege as a bar against the production of workpapers prepared by their accountants because "the act of producing" the evidence did not "rise to the level of testimony within the protection of the Fifth Amendment." Id. at 411. A valid Fifth Amendment claim arises "only when a [person] is compelled to make a testimonial communication that is incriminating." Id. at 408 (emphasis in original). While the act of surrendering records ordinarily might have testimonial aspects, the Court presumed the existence and location of the records because of the taxpayers' relationships with their accountants. Id. at 411. Finally, where an individual is not required to authenticate records, the act of producing them has only "minimal testimonial significance" because his/her assertions of identity and control are "self-evident", "foregone conclusions." Id. at 411-12. Since control of Maurice is presumed by his mother's prior legal custody, the Fifth Amendment does not bar his production.

In two cases decided late last Term, this Court clarified tests for determining whether compelled acts of production or communication are sufficiently testimonial to implicate the Fifth Amendment. First, Braswell v. United States, 487 U.S. _____, 108 S.Ct. 2284, 101 L.Ed.2d 98 (1988) held that a sole shareholder and president of a corporation was required to reveal corporate records, even if they eventually incriminated him personally, because he held the document "in a representative rather than personal capacity." Id. at 108 S.Ct. 2291, 101 L.Ed.2d 109. In situations where possession is presumed by law -- such as the custody of a child -- only additional oral testimony beyond the mere act of production triggers the Fifth Amendment; simple compliance with a subpoena or court order for production does not suffice. Id. at 108 S.Ct. 2293, 101 L.Ed.2d 112.

In Doe v. United States, 487 U.S. ____, 108 S.Ct. 2341, 101 L.Ed.2d 184 (1988) (hereinafter "Doe II") this Court further refined Fisher by holding that compelled communications are testimonial only if they either assert facts or convey information to the state. Id. at 108 S.Ct. 2351, 101 L.Ed.2d 201. A grand jury could, therefore, direct a witness to sign for the release of foreign bank records: "[D]irecting the recipient of a communication to do something is not an assertion of fact or, at least in this context, a disclosure of information." Id. Together, Braswell and Doe II have substantially narrowed the circumstances in which either acts of production or compelled communications can violate the privilege. Under those

decisions, the privilege is triggered only by public assertions of fact, not by evidence already linked to the witness through a legal status or relationship.

The juvenile court's compelled production of Maurice falls squarely within the permissible limits set by Schmerber, Fisher, Braswell and Doe II. The mother is not incarcerated because the juvenile court sought to determine from "her own mouth" where Maurice has been located, or what circumstances prompted his disappearance. Rather, she remains in jail quite simply for her consistent defiance of valid orders of protective supervision and shelter care, a summons to appear at court, and two bench orders for the immediate production of Maurice. No order or summons has compelled her to communicate facts to the state -- producing Maurice would suffice. Had the mother challenged these orders directly, she still could not have invoked the privilege because her act of producing Maurice has no testimonial implications. He is physical in nature, his identity is not in dispute, and, as in Braswell, his production would at most assert what is already presumed by the mother's prior custody and dominion over him: he is her child, placed in her control by court order.

The Maryland court's analysis cannot be reconciled with this Court's explicit holdings. It does not argue, for instance, that adverse testimonial inferences would be drawn from Maurice's simple appearance at court by means or methods unknown.[12/] Nor does the opinion suggest that the

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12/ The decision does cite four cases where production of physical evidence was barred by implicit testimonial assertions, yet it does not discuss in its analytical

(f.n. cont.'d)

mother's "truthtelling" might be needed to authenticate Maurice's identity. See Fisher v. United States, 425 U.S. at 412. Instead, the majority depends exclusively on the mother's incarceration as somehow requiring her to communicate instructions to an individual and thereby "necessarily admit a measure of continuing control and dominion over Maurice's person." Appendix A, at p. 16a.

No decision of this or any other Court is cited by the Maryland court in justifying its novel position that confidential actions or communications are embraced by the privilege because they are compelled and may result in eventual incrimination. Indeed, the mother has available numerous methods of alerting her attorney, clergy or other privileged confidant to produce Maurice without risking any knowledge or use of the communication by the authorities. (See Part C, infra). If the compelled information cannot be used as testimony or relied upon by the state in subsequent investigations, it is not protected -- the privilege only protects one "from having to share his thoughts and beliefs with the government." Doe II, at 108 S.Ct. 2349, 101

(f.n. 12 cont.'d)

summary whether these cases are applicable because Ms. Bouknight is currently incarcerated and must rely on others to facilitate Maurice's appearance. (Appendix A, pp. 13a-17a). Even assuming, however, that the opinion implies that any method of producing Maurice is privileged, including a simple surrender by the mother when or if she is freed, these cases are inapposite. Each addresses the limited situation where the objects in question are contraband and the government seeks to verify their existence: a handgun sought in a homicide investigation, a forged alien registration card, cocaine, and a criminally obscene film.

L.Ed.2d 199 (emphasis added).[13/] As Doe II noted, "it is difficult to understand how compelling a suspect to make a non-factual statement that facilitates the production of evidence by someone else offends the privilege." Id. n.11.

In fact, the Maryland court's reliance on Ms. Bouknight's incarceration as the sole basis for a Fifth Amendment violation dramatizes its reluctance to declare that any production of Maurice pursuant to CJP §3-814(c) would violate the privilege. At no point in the proceedings below did the mother ever challenge the constitutional validity of the orders she subsequently violated.[14/] Even after her arrest and loss of liberty, she chose to appeal

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13/ Since the State would never know of, and thus could never use, the privileged statement of the mother, she is in a similar position to that of a witness offered use immunity -- her words cannot be applied to incriminate herself directly or indirectly. See Kastigar v. United States, 406 U.S. 441, 453 (1972) (use immunity only insures that the testimony will not lead to criminal sanctions on the witness). Indeed, the only distinction is that her privileged instruction may ultimately lead to the production of Maurice, but if the mother is not implicated in his discovery, his production is non-testimonial and therefore non-privileged. As this Court noted in Doe II, "Th[e] prohibition [of derivative use] assumes that the suspect's initial privileged communication is testimonial." 108 S.Ct. at 2346, n.6, 101 L.Ed.2d at 196.

14/ The mother had numerous opportunities to challenge the juvenile court's authority prior to the contempt hearings of April 28, May 18 and May 26, 1988. Under Md. Rule 911(a), her counsel could have sought an immediate exception hearing to review the master's order of shelter care. Even without an exception, she could have immediately appealed pursuant to CJP §12-303(3)(x) (1988 Supp.) and sought a stay from the Court of Special Appeals, CJP §12-701(b). Other remedies were also available, including a motion to quash the summons, a request to reconsider the original order of protective supervision or an appeal of the bench orders that she present her son to court pursuant to CJP §3-814(c).

the contempt order but not the preceding orders for production of her son. This Court has condemned the practice of collaterally attacking orders of production at contempt proceedings as a means of avoiding otherwise valid civil burdens of proof or production:

> We think th[is] view . . . would convert the privilege from the shield against compulsory self-incrimination which it was intended to be into a sword whereby a claimant asserting the privilege would be freed from adducing evidence in support of a burden which would otherwise have been his. None of our cases support this view.

United States v. Rylander, 460 U.S. 752, 758 (1983). Thus, the Maryland court's dependence on the mother's incarceration masks the true issue in this case: whether any parent must obey a juvenile court order to produce his or her child under CJP §3-814(c).[15/]

C. The Decision Below Is in Conflict With This Court's Decisions Establishing When Compulsion Is Present And How Incrimination Is Measured.

The Maryland court's decision assumes that compliance with the juvenile court's orders would be compelled and incriminating under Fifth Amendment doctrine. By failing to analyze critically whether either factor is present, the court has ignored this Court's directives limiting findings of compulsion and incrimination to cases where, respectively, no non-incriminatory alternatives exist and where "real and substantial dangers" are found by a trial court.

15/ Analytically, the mother's incarceration is irrelevant. If she were freed, for instance, she would still face the same constitutional dilemma if the juvenile court renews its directive to produce the child.

In South Dakota v. Neville, 459 U.S. 553, 563 (1983), the Court held that no unconstitutional compulsion may be found when the state provides "safe, painless and commonplace" alternatives which do not themselves hinder the privilege. Thus, so long as an array of options and limited civil penalties are left available, a criminal suspect's failure to exercise those alternatives would result in "difficult" but not privileged quandaries. Id. at 563.

In this case, the mother has available any number of "silent" methods of purging her contempt without compromising her privilege. An anonymous phone call to the police; a privileged confidential instruction to her attorney, therapist, clergy, or physician; or a call to the child's current caretaker could all lead to Maurice's discovery without an incriminating statement or act by the mother. At a minimum, the attorney-client privilege undoubtedly shields any statements to her attorney. Fisher v. United States, 425 U.S. at 403-05. Since her options inflict no greater penalty than that originally imposed by the juvenile court -- temporary loss of custody of her son -- they do not present "the cruel trilemma" of self-accusation, contempt, or perjury proscribed by the Fifth Amendment. Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964).

When the Maryland court assumed that fears of child abuse and infanticide in this case automatically justified its finding that the mother has a realistic apprehension of incriminating herself, it violated this Court's carefully established system for assessing the risks of incrimination.

In Hoffman v. United States, 341 U.S. 479, 487 (1951), the Court declared that responsibility for determining the validity of a claim rested with the trial judge, whose appraisal "'must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.'" To qualify for the privilege, the fear of prosecution must be "real and substantial," not a "remote and speculative" conjecture. Zicarelli v. New Jersey State Comm'n, 406 U.S. 472, 479 (1972).

The Maryland court entered its own conclusion that the mother's fear was reasonable without analysis or justification.[16/] In so holding, the Maryland court implicitly decided issues of fact properly reserved for the juvenile court, particularly the mother's good faith and credibility in asserting the privilege. Throughout the proceedings below, the mother repeatedly asserted that her son was well and that her only motive for hiding him was to prevent his placement in foster care, (Appendix A, at p. 5a; Appendix G, at p. 72a), directly contradicting her claim for invoking the Fifth Amendment.

The trial record does not sustain a "reasonable and substantial" fear of self-incrimination. Should, for instance, the child be seriously injured or no longer alive, the discovery of his condition would not, absent forensic evidence, inculpate any particular individual, especially a parent who has had no access to him for almost a year.

16/ The court relies on BCDSS' position, first stated on appeal, that the production of Maurice might be incriminatory. (Appendix A, at p. 15a). Previously, the BCDSS argued that production of the baby would not, by itself, implicate the mother. See Footnote 9, supra at p. 8.

"Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim." Pennsylvania v. Ritchie, 480 U.S. 39, 60 (1987) (Powell, J. plurality). Despite the previous evidence of abuse, no criminal charges were filed in this case. And, while BCDSS and the local police do fear serious abuse, evidence of generalized suspicions does not substitute for demonstrating how prosecution would logically result from discovery of the infant's condition. See, e.g., Zicarelli v. New Jersey State Comm'n, 406 U.S. at 478-79 (abstract theory of incrimination is insufficient); Fisher v. United States, 425 U.S. at 412 (minor testimonial inferences are not incriminating).

D. The Decision Below Is In Conflict With This Court's Decisions That A Balancing Of Interests Is Necessary To Resolve Conflicts Between Neutral Statutes And The Fifth Amendment.

The refusal of the Maryland court to balance the interest of children in receiving protection from harm against the risk to their parents of possible self-incrimination disregards explicit standards prescribed by this Court. Under those guidelines, the mother cannot invoke her Fifth Amendment privilege to excuse the violation of CJP §3-814(c)'s requirement that she produce her son upon judicial demand.

Individuals have been subject to statutory requirements to reveal incriminating information since this Court first upheld income tax reporting requirements. United States v. Sullivan, 274 U.S. 259 (1927). In 1948, this Court also

adopted a "required record" exception to allow the production of documents required by law to be maintained for the enforcement of important government regulations. Shapiro v. United States, 335 U.S. 1 (1948). Where a statute does not put all citizens at substantial risk of self-incrimination, or where it imposes reporting obligations as a means of enforcing public values, the Fifth Amendment does not protect against disclosures of incriminating information.

Both doctrines were combined by the Court in Albertson v. SACB, 382 U.S. 70, 79 (1965), which established specific criteria to distinguish between permissibly broad statutory schemes, such as the tax code, and provisions targeting illegal activity: (1) whether the statute is "neutral" on its face and "directed at the public at large" or "a highly selective group;" (2) "whether the group is inherently suspect of criminal activity;" and (3) whether the subject is "an essentially non-criminal and regulatory area of inquiry" or "an inquiry in an area permeated with criminal statutes." These standards have been held to allow numerous neutral reporting schemes such as security filings, currency reports, and narcotics information. See, e.g., United States v. Flores, 753 F.2d 1499, 1502-03 (9th Cir. 1985).

More recently, this Court has acknowledged that its balancing of exigent public need against individual liberties is the actual mechanism underlying Albertson. In California v. Byers, 402 U.S. 424, 427 (1971), the Court upheld a California law requiring drivers in auto accidents to reveal their names and addresses:

> Tension between the State's demand for disclosures and the protection of the right against self-incrimination is likely to give rise to serious question. Inevitably, these must be resolved in terms of balancing the public need on the one hand and the individual claims of the constitutional protections on the other; neither interest can be treated lightly.

(Burger, C.J. plurality). See also Id. at 458 (Harlan, J. concurring) (non-criminal purpose of statute, its necessity, and minimal self-incrimination all support constitutionality of statute). The Court strictly applied Albertson, noting that the provision in question was directed at activities without illegal or criminal connotations (i.e., driving, involvement in an accident), a noncriminal statutory purpose, and an absolute need for the reporting requirement to fulfill the law's objectives. Ultimately, the Court upheld the statute by balancing these interests against a minimal risk of self-incrimination to all drivers, ignoring Byers' own well-founded fears. Id. at 430-31.

Like California drivers involved in accidents, parents of children who require juvenile court intervention are a large, inherently non-criminal group. As for CJP §3-814(c), its purposes are strictly civil: requiring the production of children to the juvenile court ensures that the court can fulfill its mission of protecting, treating, and rehabilitating children while working to strengthen and reunify their families. See CJP §3-802(a); In re John P., 311 Md. 700, 709, 537 A.2d 263, 268 (1988); In re Ann M., 309 Md. 564, 571, 525 A.2d 1054, 1057 (1987). Even in this case, "a citation for civil contempt in order to obtain the produc-

tion of a child such as Maurice M. or knowledge about his whereabouts, is not essentially criminal in nature and aims primarily at securing the safety of the child." Baltimore City Department of Social Services v. Bouknight, No. A-494 (Rehnquist, C.J., Circuit Justice) (Appendix D, at p. 49a).

The Maryland court's refusal to balance any interests defies this Court's explicit standards for determining the constitutionality of statutory reporting requirements. Indeed, the sole justification cited by the Maryland court -- its finding of a substantial risk of prosecution (Appendix A, at p. 22a) -- was also present in Byers but nevertheless rejected by the Court as an irrelevant factor. 402 U.S. at 428. This Court has readily tempered Fifth Amendment interests when confronted with such vital societal needs as effective prosecution of white collar crime, Braswell v. United States, at 108 S.Ct. 2294, 101 L.Ed.2d 98 and exigent threats to public safety, New York v. Quarles, 467 U.S. 649, 658 (1984). As Chief Justice Rehnquist commented when comparing Byers to the vital policies at stake here, "[p]rotecting infants from child abuse seems to me to rank in order of social importance with the regulation and prevention of traffic accidents." Baltimore City Department of Social Services v. Bouknight, No. A-494 (Rehnquist, C.J., Circuit Justice) (Appendix D, at 50a). By imposing the mother's individual plight over the safety of Maurice and all other children, the Maryland court has abdicated its parens patriae function, and it has abandoned Maurice.

This Court should therefore review this case to restore a rightful balance between children at risk of harm and their parents' right to avoid self-incrimination. The parens patriae powers exercised by juvenile courts across the nation must not be sacrificed as readily as the Maryland court did in Maurice's case.

CONCLUSION

For the above reasons, Maurice M.'s Petition for a Writ of Certiorari should be granted. The significance of this case cannot be overstated: juvenile and family courts throughout this country must have the authority to protect children at risk of serious abuse and neglect. By ignoring Fifth Amendment principles established by this Court, the Maryland court substantially diminished its juvenile court's powers to enforce its orders, thereby placing Maurice M. in further jeopardy of harm.

Respectfully submitted,

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